

# Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age

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"If we want things to stay as they are,  
things will have to change."<sup>1</sup>

## I. INTRODUCTION

With the "explosion" of written law after the Civil War, in statutes and in case reporters,<sup>2</sup> digests and encyclopedias of the law proliferated as an aid to both bench and bar. Through their efforts at synthesis, the treatise writers who brought together the written law from its ever-increasing sources became, in a sense, legal masons. They laid brick upon brick to articulate the law of divorce,<sup>3</sup> of the Constitution,<sup>4</sup> of constitutional limitations,<sup>5</sup> of nuisance,<sup>6</sup> of municipalities;<sup>7</sup> virtually no area of the law was left unreconstructed. Of those who followed this builders' craft, few were more prolific than Christopher G. Tiedeman. Though he died before reaching fifty, he had by then published seven full-length treatises, two textbooks, more than a score of articles, and a major centenary reconsideration of the Constitution.<sup>8</sup> Particularly in his construction of the interaction of property and the police power, Tiedeman played

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1. G. diLAMPEDUSA, *THE LEOPARD* 26 (1966). The words are spoken by the heir of the princely protagonist on the eve of the 1860 liberation of the Kingdom of Sicily by the republican Garibaldi and his troops.

2. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 20 (1987).

3. J. BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* (1881).

4. J. POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* (1888).

5. T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION* (1868).

6. H. WOOD, *A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY* (1875).

7. J. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* (1873).

8. Tiedeman's first book, *AN ELEMENTARY TREATISE ON THE AMERICAN LAW OF REAL PROPERTY*, was published in 1885 and thereafter he published treatises on the police power (1886), commercial paper (1889), the Constitution (1890), sales (1891), equity (1893) and local government (1894), and two textbooks, one on real property (1897) and one on commercial paper (1898). He also published a substantially expanded revision of the police power treatise (1900), numerous articles, addresses, book reviews and other short pieces.

I rely here primarily upon Tiedeman's work on the police power, which was first published in 1886 as *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* [hereinafter LPP], and which was subsequently released in a revised two-volume edition in 1900 as *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES* [hereinafter SFC], and upon Tiedeman's paper for the Missouri Bar Association on the occasion of the centenary of the Constitution, which was published in book form in 1890 as *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* [hereinafter UC]. I also draw upon several of Tiedeman's articles.

an important role in framing for the Gilded Age the central questions posed by the expansion of government and of enterprise.

Today Tiedeman is remembered chiefly as one of the fiercely conservative legal thinkers whose doctrines the New Deal discredited after reactionary courts had used them as constitutional weapons to fend off attacks on big business by populist-backed legislatures. But the theme that is predominant in Tiedeman's work throughout the course of his intellectual career, we can now see, is not the antimajoritarian one. In fact, it is the fear of large-scale institutions, whether in the economy or in the government, overwhelming small-scale enterprise. This fear led him to focus alternately on the perils of democratic majorities bent on redistribution and on the dangers of big business quashing competition in the marketplace.

As the United States increasingly became a nation of employees and employers, rather than individual entrepreneurs, Tiedeman probably presented an accurate reflection of a disappearing social group that saw itself squeezed between two expanding classes. On the one hand, the propertyless seemed to threaten those who hold property; on the other, those with great concentrations of property seemed to threaten smallholders.

The social and economic fears of the latter are expressed in Tiedeman's jurisprudence, which resists governmental regulation of the economy until the moment when only government intervention can save it from disappearance. He then would demand the most extreme remedies, including nationalization and takeover of banks, railroads, communications, insurance, indeed, of all enterprise which cannot operate outside the corporate framework. This remedy, he explains, will save private property.

Though a supporter of judicial review, one who believed the signal value of the Constitution was precisely the means it gave of thwarting the popular will, by the end of his life, it was to the legislative power he appealed for the nationalization of great enterprises that he thought required to preserve a competitive marketplace. Necessarily, this unstable position led to inconsistencies between his early and later work; yet, it may be said, the early work, in its fears of the concentration of power, prefigures the later.

In this Article, after a sketch of Tiedeman's life, I consider the modern view of this author and the issues of government and economy central to his thought; I then discuss his search for limitations on government and whether they are located in the Constitution. Finally, I discuss Tiedeman's view of monopoly and the justification for government takeover, concluding with a discussion of his search for a means to maintain a competitive economy.

## II. BIOGRAPHICAL SKETCH

The evidence of Tiedeman's early life is limited.<sup>9</sup> Born in 1857 into an apparently well-to-do family in Charleston, South Carolina, he was bright as a

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9. I have not located Tiedeman's papers or even confirmed that they are extant. Tiedeman's widow offered his papers to the New York University School of Law, but they were not accepted. Interview with John Reid (May, 1989). Biographical details are taken from a sketch published on the occasion of his accession as Dean of

youth, graduating from the College of Charleston at eighteen. After college, he went abroad to study in Germany, possibly living with relatives, and attended the lectures of von Jhering and others of the German free law movement.<sup>10</sup> He received his law degree from Columbia University in 1879 and returned to Charleston, where he practiced law briefly. He then moved to St. Louis and, after a year of practice, during which he wrote on legal topics for regional law journals,<sup>11</sup> joined the law faculty of the University of Missouri in 1881 as an assistant professor. He became a full professor the following year and never again practiced law. Tiedeman spent ten years teaching in Missouri at a time of intense populist and antimonopoly agitation in that state.<sup>12</sup>

In 1883, at the age of twenty-six, he published his first treatise, *The Law of Real Property*, and it remained in print for the next forty years. He then published *A Treatise on the Law of Commercial Paper* (1889), *The Unwritten Constitution of the United States* (1890) and *A Treatise on the Law of Sales of Personal Property* (1891), together with *A Treatise on the Limitations of the Police Power* (1886), the first edition of this work.

In 1891, he accepted an offer of a professorship at the law school of the University of the City of New York (later New York University School of Law). While in New York, he published *A Treatise on Equity Jurisprudence* (1893) and *A Treatise on the Law of Municipal Corporations in the United States* (1894), as well as articles, *inter alia*, on legal education,<sup>13</sup> the role of precedent in the law,<sup>14</sup> the Supreme Court's view of monetary policy,<sup>15</sup> and the constitutional origins of judicial review.<sup>16</sup> The university granted him the honorary degree of Doctor of Laws in 1895. In 1897, he left the New York position to devote his time entirely to writing, producing a number of articles, two texts,

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the Buffalo Law School, CHRISTOPHER G. TIEDEMAN, LL.D., 6 THE IRIS (1903), 18 THE DICTIONARY OF AMERICAN BIOGRAPHY 531 (1946) and WHO'S WHO IN AMERICA, 1903-05 1483 (1903).

10. Rudolf von Jhering (1818-1892) was a German "legal scientist," of the late nineteenth century, best known in this country as a proto-realist critic of formalism in the civil law; see von Jhering, *In the Heaven of Legal Concepts*, in F. COHEN & M. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678-89 (1951). For a discussion of von Jhering's impact on the American realists, see J. Herget & S. Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 407-09 (1987). Tiedeman read von Jhering as an anti-Austinian historicist, a proponent of law as the product of social forces. See, e.g., UC, *supra* note 8, at 145 n.1.

11. The articles were on a variety of topics, but their general format was a review of recent cases for the benefit of practitioners. See, e.g., *The Right of a Stranger to Maintain an Action upon a Contract*, 11 CENTRAL L.J. 161 (1880); *Impossibility of Performance as a Defense to Actions ex Contractu*, 12 CENTRAL L.J. 4 (1881); *The Liability of Banks in Making Collections for the Acts of Correspondents and Notaries*, 12 CENTRAL L.J. 149 (1881); *Conflict of Laws in Relation to Marriage*, 12 CENTRAL L.J. 510 (1881); *Contract by Telegraph-I*, 28 PITTSBURGH L.J. 457 (1881); *Contract by Telegraph-II*, 28 PITTSBURGH L.J. 467 (1881).

12. See S. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST 33-71 (1985); D. THELEN, PATHS OF RESISTANCE: TRADITION AND DIGNITY IN INDUSTRIALIZING MISSOURI (1986).

13. Tiedeman, *Methods of Legal Education*, 1 YALE L.J. 150 (1892).

14. C. Tiedeman, *The Doctrine of Stare Decisis and A Proposed Modification of its Practical Application in the Evolution of the Law*, 19 PROCEEDINGS N.Y. ST. BAR ASSOC. (1896) [hereinafter *Stare Decisis*]; *Dictum and Decision*, 6 COLUMBIA LAW TIMES 35 (1892); *The Law Writer's Services to the Profession*, 1 INTERCOLLEGIATE L.J. 137 (1892).

15. C. Tiedeman, *Silver Free Coinage and the Legal Tender Decisions*, 9 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 198 (1897).

16. C. Tiedeman, *The Political Significance of the Case of Marbury v. Madison*, 2 THE BRIEF 3 (1899).

*Selected Cases on Real Property* (1897) and *A Treatise on the Law of Bills and Notes* (1898), and the revision of the police power work, *A Treatise on State and Federal Control of Persons and Property in the United States* (1900). In 1902, he became Dean of the Law School of the University of Buffalo. A year later, shortly after the publication of an important article on government ownership of monopolies,<sup>17</sup> he died. According to a memorial tribute, "His kindly interest in young men, his profound learning, his sincere character, and his gentlemanly manners, endeared him alike to his students and to his associates."<sup>18</sup>

His work was a staple of both courts and academia. His textbooks remained in print through the twenties and his treatises were cited through the forties in well over 400 opinions of the highest courts of the states.<sup>19</sup> He saw his work and that of the other legal synthesists active in the Gilded Age as making concrete and explicit the implications of the law developed in the courtroom and legislative chamber.<sup>20</sup> His own assessment was that his task had been "to present in a clear light the rule of law, as it emerges from the clashing interests represented by . . . decisions."<sup>21</sup>

### III. TIEDEMAN IN THE TWENTIETH CENTURY

In the books of Clyde Jacobs,<sup>22</sup> Arnold Paul,<sup>23</sup> and Benjamin Twiss,<sup>24</sup> historians in the Progressive tradition,<sup>25</sup> Tiedeman is depicted as a publicist who brought to the courts the economic constitutionalism exemplified by *Lochner v. New York*<sup>26</sup> and then swept away by the New Deal. For them, Tiedeman is a figure within the mainstream of "laissez-faire constitutionalism," a doctrine of substantive due process, economic liberalism, and liberty of contract. Jacobs, Paul, and Twiss have been criticized by others in respect to their discussions of the lawyers and judges of the Gilded Age.<sup>27</sup> Those criticisms often point out a failure to recognize jurisprudential motives for the approval of applications of

17. C. Tiedeman, *Government Ownership of Public Utilities*, 16 HARV. L. REV. 476 (1903).

18. "Memorial," Minutes of the Special Meeting of the Council of the University of Buffalo (October 8, 1903) (available in the Archives of the State University of New York, Buffalo).

19. See, e.g., *Indiana Bd. of Medical Registration v. Suelean*, 219 Ind. 321, 327, 26 A.2d 865, 869 (1942); *Sherlock v. Duck Creek Twp.*, 338 Mo. 866, 875, 92 S.W.2d 675, 679 (1936) (citing *Tiedeman on Commercial Paper*); *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 102, 26 A.2d 865, 869 (1941) (citing LPP).

20. "Standing beyond the heat and excitement of party strife and the contention for the assertion and protection of private rights, the well-trained legal author is better able than either judges or practitioners to decide what principles of law are being developed in litigation and what modifications of established principles are being thereby effected." *The Law Writer's Services to the Profession*, *supra* note 14, at 138-39.

21. *Id.*

22. C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954).

23. A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1976).

24. B. TWISS, *LAWYERS AND THE CONSTITUTION* (1942 & repr. ed. 1962).

25. For a discussion of that tradition, see Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679 (1984).

26. 198 U.S. 45 (1905).

27. See, e.g., Jones, *Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration*, 53 J. AM. HIST. 751 (1967); Gold, *Redfield, Railroads and the Roots of 'Laissez-Faire Constitutionalism'*, 27 AM. J. LEGAL

laissez-faire constitutionalism other than deference to the aims of enterprise.<sup>28</sup> But rarely can these three have been as inapt as in their portrayal of this figure, many of whose strongly-held opinions they appear simply to have ignored. They may perhaps be excused, for the later Tiedeman reads differently than the earlier; it may have been the former on whom these historians relied to form their judgment.

The focus of Tiedeman's thinking changed with the waning of the century. He wrote in the eighties primarily as an opponent of regulation, which then seemed to him equivalent to, or at least threatening, redistribution. By the close of the nineties, that decade of economic concentration, depression, and labor unrest, he argued forcefully that only nationalization of banks, railroads, insurance, and communications could preserve small-scale enterprise from a socialistic public sentiment that arose in reaction to the depredations of large-scale enterprise. Of this one finds no hint in the bare characterization of Tiedeman as a laissez-faire ideologue.<sup>29</sup>

#### A. Tiedeman in "Progressive" Historiography

Clyde Jacobs, in his classic and influential 1954 book, said of Tiedeman, "When other authorities were lacking on a given proposition of laissez faire or when they were hostile to that proposition, the bench and bar might confidently refer to works of Tiedeman for support."<sup>30</sup> It was Tiedeman, together with Thomas M. Cooley, who were "instrumental in the formulation, development, and application of the liberty of contract principle as a limitation upon the po-

HIST. 254 (1983); Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 386-88 (1988).

28. See Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298 (1985), arguing that the Progressive historians' overall view of laissez-faire constitutionalism neglects its "congruen[ce] with a well-established and accepted principle of American liberty." Benedict makes a fourth Progressive historian, Sidney Fine, his target. Fine's book, *LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901* (1964), does not discuss Tiedeman, though Cooley plays a role in it.

29. Two distinguished modern legal historians have also neglected this aspect of Tiedeman's thinking. Herbert Hovenkamp refers to Tiedeman's "extremely narrow" view of the state's police power in *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1624 (1988). Tiedeman in fact believed that the government's police power was broad enough to encompass takeover of major elements of the economy. See *infra* text accompanying notes 177-86.

Morton J. Horwitz very aptly identifies Tiedeman's economic thinking as the product of "the anguish of the old conservative witnessing the rise of industrial concentration," and notes Tiedeman's opposition to free incorporation in *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 206 (1985), but does not mention that Tiedeman went further and called for nationalization of the great concentrations of capital.

See also, J. May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 264-65 (1989), citing JACOBS, *supra* note 22, for the claim that "state courts increasingly invoked . . . the scholarly work of Thomas M. Cooley and Christopher G. Tiedeman, to support establishment of a thoroughgoing laissez-faire constitutionalism . . ."

Modern-day conservatives have also claimed the antimajoritarian Tiedeman as their own, ignoring the proposition of nationalization, see e.g., M. Debow & D. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 1004 n.47 (1988). On the other side, Tiedeman's view of law as a product of social forces, see *infra* text accompanying notes 108-22, has led one writer to describe his picture of the Constitution as "anticipating the point of view of progressive historians such as Charles Beard . . ." Belz, *The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship*, in *ESSAYS IN NINETEENTH CENTURY AMERICAN LEGAL HISTORY* 580, 594 (W. Holt ed. 1976).

30. Jacobs, *supra* note 22, at 62.

lice power of the state. . . ."<sup>31</sup> According to Jacobs, "[T]he force and prestige of his work undoubtedly derived from its logical consistency and rigor."<sup>32</sup> Jacobs' Tiedeman is a creative legal scholar who "deserves credit for . . . crystallization [of laissez-faire] into a fixed and pervading dogma."<sup>33</sup> Jacobs believed Tiedeman's influence was "most pronounced" where courts struck down statutes which barred discrimination against trade unions.<sup>34</sup>

Jacobs' version is adopted by Arnold Paul.<sup>35</sup> For Paul, Tiedeman is the "link"<sup>36</sup> between late nineteenth century laissez-faire thinking and the legal conservatism that Paul implies derives from the Federalists.<sup>37</sup> According to Paul, it was Tiedeman who "had marked out the course by which conservatism could resist the tides of change and maintain substantially intact the *status quo*."<sup>38</sup> Drawing on Jacobs, Paul says "Tiedeman's chapters on 'Police Regulations of Trades and Professions' and 'Police Regulation of the Relation of Master and Servant,' which hemmed in the legislative power at every point, became rich source grounds for citations justifying judicial invalidation of state regulation."<sup>39</sup>

Benjamin Twiss, one of the early New Deal legal historians, considered Tiedeman the writer who shepherded the courts to the new individualism of liberty of contract—the John the Baptist of the *Lochner* court, as it were. It was "[t]hanks to Tiedeman's *Limitations on the Police Power* that the doctrine of liberty of contract spread in a short time to many state courts," and "[e]ventually . . . reached the Supreme Court. . . ."<sup>40</sup> According to Twiss, "Professors Cooley and Tiedeman were largely successful in making the Supreme Court an *economic* court."<sup>41</sup> Tiedeman was a "legal publicist"<sup>42</sup> whose triumph was to make the idea of limited government "respectable."<sup>43</sup>

In this view, treatise writers like Tiedeman and Cooley constructed a theoretical framework which, from the nineties on, encouraged the "*bad* judicial review"<sup>44</sup> that supported big business and the railroads and blocked appropriate responses to the economic problems of the turn of the century. Not until 1937 and the New Deal reorientation of the Supreme Court of the United States was

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31. *Id.* at vi.

32. *Id.* at 62.

33. *Id.*

34. *Id.* at 76.

35. PAUL, *supra* note 23.

36. *Id.* at 18.

37. *Id.* at 4-5.

38. *Id.* at 27.

39. *Id.* at 17. Paul refers here to Chapters IX and XIV, respectively, of the 1886 edition of the police power treatise.

40. TWISS, *supra* note 24, at 129.

41. *Id.* at 257 (emphasis in original). Paul, Twiss, Jacobs and others have written that Cooley's work both formulated and lent support to laissez-faire ideologies, but Jones, *supra* note 27, at 751, has concluded that "a reconsideration of these assessments is needed . . . ."

42. TWISS, *supra* note 24, at 122.

43. *Id.*

44. PAUL, *supra* note 23, at xvi (emphasis in original).

the influence of the conservatives overthrown and the need for government control and oversight of big capital entirely vindicated.<sup>45</sup>

### B. Tiedeman as Reactionary

A good deal of Tiedeman's fearsome reputation as a reactionary is based upon the Preface to the first edition of his treatise on the police power, published in 1886,<sup>46</sup> and a centenary view of the Constitution published in 1890.<sup>47</sup> In those pieces, Tiedeman, in forceful, even dire, language, described what "the conservative classes"<sup>48</sup> saw around them after the Haymarket bombing.<sup>49</sup> "Socialism, Communism, and Anarchism are rampant throughout the civilized world," he wrote:

Contemplating . . . the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.<sup>50</sup>

This seems to summarize the fears of a ruling elite: the economic discontent of a propertyless majority, when it can be expressed at the ballot box, may impose unacceptable conditions of economic and political life upon the property-owning minority. Tiedeman proposes to solve the problem by reading the Constitution as containing "limitations to protect private rights against the radical experiments of social reformers. . . ."<sup>51</sup>

The conservation of private rights confines the exercise of state power to "the detailed enforcement . . ."<sup>52</sup> of "the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *sic utere tuo, ut alienum non laedas* [Use your own property in such a manner as not to injure that of another]."<sup>53</sup> Any legislation going beyond *sic utere* "is a governmental usurpation . . ."<sup>54</sup> Indeed, "[t]he unwritten law of this country is in the main against the exercise of the police power, . . ."<sup>55</sup> No doubt for most who read Tiedeman in his lifetime, and certainly for those who read him after his death in 1903, this is the sum of his thinking. Particularly for the Progressive historians, Tiedeman was simply one of the intellectual bulwarks of a ruling class

45. *Id.* at 237.

46. LPP, *supra* note 8.

47. UC, *supra* note 8.

48. LPP, *supra* note 8, at vii.

49. On May 4, 1886, in the course of a campaign for the eight-hour work day, a bomb was thrown at a labor rally in Chicago and police responded with gunfire, causing death and injury. Seven people were indicted for conspiracy and convicted; four were hanged and three pardoned. The Haymarket bombing fixed in the public mind the image of union organizers as anarchists and terrorists. See H. DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR* (1963).

50. LPP, *supra* note 8, at vii. Tiedeman discounted the possibility of real democracy. Echoing Sir Henry Maine, he wrote, "All governments are either monarchies or oligarchies." UC, *supra* note 8, at 121.

51. 1 SFC, *supra* note 8, at viii.

52. *Id.* at vii.

53. *Id.* at 2.

54. *Id.* at 5.

55. LPP, *supra* note 8, at 10.

well-provided with the wherewithal to support academic clients and in need of "a constitutional law favorable to the laissez faire economic philosophy . . . ."<sup>56</sup>

It is not the purpose of this paper to argue that Tiedeman is a forgotten genius of the common law, an early prophet, or even a scholar of rare insight. But neither is he the cardboard cut-out conservative of the Gilded Age. Indeed, his writing reveals his orientation to have been, if anything, hostile to economic concentration and large-scale enterprise. Although it is how he came to be read, the goal of preventing democratic majorities from limiting the rights of property lost its paramount position in his thinking and writing, and, at least by 1900, another issue assumed greater proportions, one many of the Progressives, had they taken notice, would have found congenial: Tiedeman wanted the law to ensure "that the small tradesman, manufacturer and artisan, sh[ould] not be driven to the wall, overpowered by the giant combinations."<sup>57</sup>

Far from being a narrow proponent of laissez-faire, he sought to enlist the power of the state toward the preservation of small business. This aim seems to have been present in his thinking in a somewhat inchoate form *ab initio*, but its development required the immense growth of productive forces and the "concentration and oligopoly"<sup>58</sup> of the Gilded Age. Somewhat ambivalently in the 1886 version of his police power treatise,<sup>59</sup> more concretely and broadly in the 1900 revision,<sup>60</sup> and explicitly in a *Harvard Law Review* article published three months before his death in 1903, Tiedeman called for the federal government to take over the great enterprises he called public utilities. Only thus could small-scale enterprise survive.

Perhaps nationalization as the proposal of an anti-majoritarian ideologue of smallholders could not be acknowledged by Progressive legal historians, celebrating the victories of the New Deal over its reactionary predecessors.<sup>61</sup> Perhaps it is simply the case that his first, and more conventional, edition of the police power treatise was cited more widely than the second, and was thus more familiar to legal historians.<sup>62</sup> For whatever reason, Tiedeman was lumped together with conservative jurists like James Coolidge Carter and Joseph Choate, whose careers were in the service of the giant combinations Tiedeman so opposed.<sup>63</sup>

56. JACOBS, *supra* note 22, at 22.

57. SFC, *supra* note 8, at 611.

58. A. CHANDLER, *THE VISIBLE HAND* 489 (1977).

59. LPP, *supra* note 8, at 326-27.

60. 1 SFC, *supra* note 8, at 586-612. Significantly, Tiedeman renamed the second edition of his treatise on the police power, calling it *STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY*, rather than *LIMITATIONS ON THE POLICE POWER*. In the second edition, little of the earlier material was deleted, but a good deal was added which expanded the view of the power of the state to control the economy.

61. See, e.g., PAUL, *supra* note 23, at 229 ("[I]n the critical days of the New Deal, . . . a new popular-based reformism ran up against the constitutional and legal defences that had been erected in the 1890's . . .").

62. The first treatise is cited by state high courts almost 60 times; the second version, less than 25. States library, High Cts file. See, e.g., cases cited *supra* note 19. For an example of a high court citation to the first edition when the second was already extant, see *infra* note 148.

63. TWISS, *supra* note 24, Chapter VIII *passim*.



## IV. GOVERNMENT AND ENTERPRISE

A. *Small-Scale Enterprise as Key to Tiedeman's Thought*

A more accurate picture of Tiedeman may be that he attempted to carry forward into the twentieth century, though without marked success, the pre-Civil War republican ideal of the American economy as a congeries of small dealers, entrepreneurs, manufacturers, and artisans who competed on a roughly equal level in small-scale markets.<sup>64</sup> Aided by government assistance to local and regional economies, it would be unhampered by government control.<sup>65</sup> But having begun by fighting government control by legislative majorities fixed, as he thought, on redistributive schemes, Tiedeman came to believe that his real battle was with his own side, and that the threat to small-scale enterprise was from big capital, not government or labor.<sup>66</sup> He is representative of the confusions of a group no longer able to fare on its own, but equally bemused by the alternatives presented to it.<sup>67</sup>

Concern for individual enterprise was the touchstone of Tiedeman's intellectual career. That is evident as early as the 1886 Preface, written when he was in his twenties and containing perhaps the most inflammatory writing of his career. Then, Tiedeman considered government, whether autocracy or democracy, the great threat to individual rights. He described the individual as unprotected when a monarch could "impose numerous restrictions, all tending to oppress the weaker for the benefit of the stronger."<sup>68</sup> But when the divine right of kings disappeared "and the opposite principle [was] substituted,"<sup>69</sup> the individual might still feel "the encroachments of . . . government upon his rights and liberty."<sup>70</sup> Later "the popularization of the so-called *laissez-faire* doctrine"<sup>71</sup> served as a restraint on democracy. But *laissez-faire* disappeared as "[t]he State

64. W. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* 52 (1982) ("[S]ocial and economic realities in the egalitarian, mid-nineteenth century rural North, . . . [included] small property owners and small businessmen [who] contracted with one another on a free and equal basis.").

65. M. MEYERS, *THE JACKSONIAN PERSUASION* 29 (1960) ("The hardy race of independent republicans, engaged in plain and useful toil, need no more than a stable government of equal laws to secure their equal rights.").

66. Like the Jacksonians, he perceived the threat to the republic as coming from the direction of "concentrations of wealth arising suddenly from financial manipulation and special privilege . . ." MEYERS, *supra* note 65, at 23. See *infra* text accompanying notes 144-48.

67. He is perhaps an inheritor of what Meyers called "the Jacksonian struggle to reconcile . . . the simple yeoman values with the free pursuit of economic interest, just as the two were splitting hopelessly apart." MEYERS, *supra* note 65, at 15.

There is of course a danger in pushing the Jacksonian connection too hard. For one thing, Tiedeman was clearly antidemocratic in his opposition to allowing majoritarian legislation and favored judicial review precisely as a restraint. But more to the point, the Jacksonian ideology is so protean and unstable that it will support a great many conclusions about who its true descendants are. For example, McCurdy argues, in *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 973 *et passim* (1975), that Field, whose dissent in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting), later became the foundation of the economic Constitution, was writing out of a Jacksonian tradition; Tiedeman, about whom I make the same argument, believed fervently that Field's dissent was wrongheaded and that only adherence to the *Slaughterhouse* majority position could protect the public from overreaching by monopolists. See *infra* text accompanying notes 168-74.

68. LPP, *supra* note 8, at v.

69. *Id.*

70. *Id.* at vi.

71. *Id.*

[was] called upon to protect the weak against . . . the [strong]."<sup>72</sup> In a monarchy, the strong may oppress the weak and in a democracy, the weak may be protected from the strong; but *both* oppression and protection are objectionable as unwarranted exercises of government power. And why? "Many trades and occupations are being prohibited because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies."<sup>73</sup>

## B. *The Economic Background*

Tiedeman's era was one in which concentration and oligopoly were fast becoming the order of the day. "Almost nonexistent at the end of the 1870's . . . integrated enterprises came to dominate many of the nation's most vital industries in less than three decades."<sup>74</sup> Large firms were escaping from market discipline, from "a market in which participants were numerous enough and modest and equal enough in resources for no one or several to control price and quality competition by overt collusion or by mutually regardful business policies."<sup>75</sup> Given the astounding pace of economic centralization,<sup>76</sup> Tiedeman's original concern to preserve enterprise from government intervention shifted to an attempt to preserve the marketplace for small business. The view that, *post* its initial pre-war investment in infrastructure, government non-intervention in the economy was the best guarantee of development was replaced by the demand for government intervention to ensure that small-scale enterprises could continue to function.

Although the early nineteenth century was described as the age of *laissez-faire* by late nineteenth century legal scholars, including Holmes<sup>77</sup> and Tiedeman,<sup>78</sup> that is perhaps a more accurate description of its social and religious thought than its economic beliefs.<sup>79</sup> *Laissez-faire* has not been considered an apt description of antebellum economic thought at least since Willard Hurst, more than thirty years ago, began to demonstrate that a more pragmatic approach to government intervention in the economy prevailed before the Civil

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72. *Id.*

73. *Id.*

74. CHANDLER, *supra* note 58, at 285. By the turn of the century, "[i]n the sectors in which such large firms moved, three to eight firms now commonly accounted for the bulk of trade," W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* 183 (1970).

75. *Id.*

76. According to CHANDLER, *supra* note 58, at 366, Table 9, by 1909, machinery, metals, petroleum, food processing, rubber and tobacco were all industries in which from one- to three-quarters of total product value was accounted for by oligopolistic production.

77. See, e.g., Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897) referring to the property-protective legal doctrines of the *fin de siecle* as "new principles . . . discovered outside the . . . [Constitution] which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago."

78. See *Dictum and Decision*, *supra* note 14, at 36 ("[F]ifty or sixty years ago, . . . the popular opinion was strongly against legislation which interfered with private business and the *laissez-faire* philosophy exerted the dominant influence over public opinion in this country . . .").

79. Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 412 *passim* (1988).

War.<sup>80</sup> The thought of that period was at ease with the concept of government as an engine of economic development, despite its opposition to federal regulation.<sup>81</sup> Today the Jacksonian era is viewed as one in which government investment was eagerly sought for infrastructure expansion.<sup>82</sup>

Tiedeman shared that view and its rationale: The state had a responsibility for the public good; it could, as guardian of the public welfare, undertake or subsidize projects of improvement which would benefit the citizenry. Because rights of ownership ultimately derived from the state,<sup>83</sup> it had powers of eminent domain to reclaim private property for public purposes and those powers could be transferred into private hands. These special benefits to particular entrepreneurs or investors were in the nature of a government grant or franchise. They created monopolies designed to promote general prosperity, but were not a matter of right.<sup>84</sup>

## V. SEARCHING FOR THE LIMITATIONS ON GOVERNMENT

The above theory served when the aid of the state was required in developing the infrastructure of a growing nation before the Civil War. But in the post-Civil War economic expansion, a theory of state-originated private property posed the threat that democratic forces controlling state legislatures would impose unacceptable conditions on further development. The Jacksonians, despite their language in opposition to federal involvement in the economy, had in general aggrandized the state role in that arena. A rationale was now required to oust it.<sup>85</sup> The initial attempt at ouster, now that government was becoming a regulator, rather than an investor, retained the postulate of the propriety of state intervention, but modified it with a doctrine of the inherent limitations of majoritarian state action.<sup>86</sup>

80. W. HURST, *LAW AND THE CONDITIONS OF ECONOMIC FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956); see also, O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY; MASSACHUSETTS, 1774-1861* (1947); L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948).

81. "In the first three decades of the century, virtually every state and locality in the nation sought to aid the economy by building roads and encouraging the construction of privately owned turnpikes," W. NELSON, *supra* note 64, at 13.

82. See, e.g., C. GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890* (1960); H. SCHEIBER, *THE OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY* (1969); L. MERCER, *RAILROADS AND LAND GRANT POLICY: A STUDY IN GOVERNMENT INTERVENTION* (1982).

83. "The absolute right of property being in the State, the right of ownership, which an individual may acquire, must therefore, in theory at least, be held to be derived from the State, and the State has the right to stipulate the conditions and terms upon which the land may be held by individuals." Tiedeman, *What is Meant by 'Private Property in Land'?*, 19 AM. L. REV. 878, 883 (1885).

84. 1 SFC, *supra* note 8, at 303.

85. The "state power to create or regulate [monopolies] challenged at various times under the commerce clause, the contract clause, the article IV privileges and immunities clause, the due process clause of the fourteenth amendment, the equal protection clause, the fourteenth amendment privileges and immunities clause, the thirteenth amendment, the patents clause of article I, section 8, the general theory that states had a finite 'police power,' and the theory that no legislature could bind its successors in matters pertaining to public health or welfare." Hovenkamp, *Technology, Politics, and Monopoly*, 62 TEX. L. REV. 1263, 1281-82 (1984) (citations omitted).

86. NELSON, *supra* note 64, at 45-48, stresses the extent to which antimajoritarian protection of property rights was given intellectual support by the natural rights thinking of antislavery advocates.

### A. *The Formulation of the Police Power*

The notion of the police power, originally broad,<sup>87</sup> became constrained in the *post-bellum* period. Thus, says Tiedeman, in the Preface to the first edition of the police power treatise, he has written to demonstrate that:

[u]nder the written constitutions, Federal and State, democratic absolutism is impossible in this country . . . . The substantial rights of the minority are shown to be free from all lawful control or interference by the majority, except so far as . . . may be necessary to prevent injury to others in the enjoyment of their rights.<sup>88</sup>

The idea of a *limited* police power made room for the new doctrines of substantive due process and liberty of contract to serve as the underlying rationales of limitation. But it was not Tiedeman who applied these doctrines for their limiting effect. Indeed, he was critical of them in his later writing, referring to them as "technical rules of constitutional law which rest upon that fiction [of equality]."<sup>89</sup>

Tiedeman never clarified his own view of *where* the limitations of the police power were located within the Constitution.<sup>90</sup> While he says that "[T]he police power of the government is shown to be confined to the detailed enforcement [*sic*] of the legal maxim, *sic utere tuo, ut alienum non laedas*,"<sup>91</sup> the reader looks in vain for Tiedeman to demonstrate that this limitation occurs within the letter of the Constitution. Instead, one reads that it is the *unwritten* law of the country that restrains the exercise of the police power.<sup>92</sup> The closest Tiedeman approached a constitutional derivation of police power limitations was in very broadly locating the constitutional guarantee of freedom from state constraint in the fifth and fourteenth amendment protections against deprivation of life, liberty or property without due process. In the language that probably led Twiss<sup>93</sup> to conclude he was the apostle of liberty of contract, he says:

In searching for constitutional restrictions upon police power, . . . resort [may] be had to . . . those general clauses, which have acquired the name of 'glittering generalities,' . . . . If, for example, a law should be enacted, which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizen unnecessarily, and in such a manner that it did not violate any specific provision of the constitution, it may be held invalid, because in the one case it interfered with the inalienable right of property, and in the other case, it infringed upon the natural right to life and liberty.<sup>94</sup>

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87. Judge Lemuel Shaw, who articulated the police power as the hitherto inchoate powers of state governments, described it as "the power vested in the legislature by the constitution, to make and establish all manner of wholesome and reasonable laws, statutes and ordinances . . . not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth . . . ." *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

88. LPP, *supra* note 8, at vii.

89. 1 SFC, *supra* note 8, at 423-24.

90. LPP, *supra* note 8, at vii.

91. *Id.*

92. *Id.* at 10.

93. Twiss, *supra* note 24, at 129.

94. LPP, *supra* note 8, at 10-11. But Tiedeman later makes clear that he does not believe there are *any* natural rights, making the location of police power restraints even fuzzier. See *infra* text accompanying notes 115-18.

The limitations on deprivation of life, liberty or property without due process are, in effect, the limitations of the police power. "If these general constitutional provisions contain the only limitations upon the legislative power to regulate employments, in order to determine what are the specific limitations which these provisions impose, it will be necessary to refer to the limitations upon the police power."<sup>95</sup>

There is obviously some circularity here; the most one can say is that, writing in 1886, before the doctrine of the embedded constitutionality of liberty of contract and substantive due process was fully developed, Tiedeman did not claim that the Constitution clearly delineated that version of economic liberty from restraint which would come to be used, in *Lochner* and elsewhere, as a bar to legislative interference with the inexorable processes of the economy.

### B. *The "Scientific" View of the Police Power*

In fact, Tiedeman's argument for the protection of private property is, in the main, derived not from natural law, but from nature.<sup>96</sup> That is to say, Tiedeman believed that there was scientific support for the notion that private property was an inherent necessity of human society. The inviolability of private property, though an unwritten "generality," was part of the law of nature in a scientific sense. For this proposition, Tiedeman found support in the work of Herbert Spencer. Tiedeman's embrace of Darwinism in its Spencerian forms was part of a general Gilded Age appeal to science as a source of first principles, both political and economic.

Spencer, through his own relentless self-promotion and lack of false modesty,<sup>97</sup> had become known as a foremost Social Darwinist, though in fact he first floated his theory of intra-species competition in the human struggle for survival eight years before the publication of *The Origin of Species* in 1859.<sup>98</sup> Spencer's claim was that forms of public organization, like the state, were remnants of a lower stage in the development of the human species, when primitive collectivism was required.<sup>99</sup> In the process of evolution, the species became stronger as the struggle for survival killed off weaker specimens; the remaining individuals were, or should be, ever less dependent on such social forms. Indeed, with further adaptation, the species would cast off these forms entirely and social life

95. *Id.* at 195-96.

96. Nelson has suggested that, in the post-war period, it was no longer possible to rely on higher law thinking to support the right to private property because that thinking, with the success of abolition, could be read equally as protecting egalitarian principles. See, NELSON, *supra* note 64, particularly Chapter 3, "The Triumph and Failure of Antislavery and the Transformation of Federalism." For this reason, those concerned with the public welfare turned to science to develop rationales for action. See *id.*, Chapter 4, "The Quest for a Scientific Morality."

97. Spencer, in his autobiography, tells how his admirer George Eliot once asked why, though he thought so much, his brow was unfurrowed. "I suppose it is because I am so rarely puzzled" he replied. I AUTOBIOGRAPHY OF HERBERT SPENCER 462 (1904), cited in W. IRVINE, APES, ANGELS AND VICTORIANS 29 (1955).

98. SPENCER'S SOCIAL STATICS: OR, THE CONDITIONS OF HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED was published in 1851; DARWIN'S THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION in 1859.

99. For a fuller discussion of Spencer and his impact on American legal theory, see Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985).

would become quite private. Society would exist, but not the state.<sup>100</sup> Private enterprise was a sign of this movement; capitalism signalled a higher stage of human evolution than any to date. The opponents of private enterprise represented evolutionary failures, individuals unsuited to the bloody but inevitable struggle for survival. State involvement in the economy in behalf of society's weaker elements was retrogressive.<sup>101</sup>

Spencer, with his proposition that private property was an imperative product of the laws of human evolution, provided intellectual respectability for Tiedeman's claim that *sic utere* was a "fundamental rule" of human existence. The reason each person had a right to property and had to respect the equal right of others was because the evolution of the species required it. "[A]ny further restraint is unwholesome," Tiedeman wrote.<sup>102</sup>

The political version of Spencer's theory of social evolution was expressed in his rule that "every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man."<sup>103</sup> This is quite clearly an adaptation of the old rule of *sic utere* and Tiedeman was willing to accept it as such. All that with which the state cannot interfere is liberty, for "liberty is that amount of personal freedom which is consistent with a strict obedience to this rule" of *sic utere*.<sup>104</sup>

While this version of Spencer's formulation does not speak of freedom to own or use property but merely to act, it nonetheless has a property-protective character when put in context: Liberty, in its American version, becomes equivalent to liberty of contract.<sup>105</sup> In the second edition of the police power work,<sup>106</sup> Tiedeman makes this equation clear by quoting the definition of liberty from *Allgeyer v. Louisiana*,<sup>107</sup> immediately after citing Spencer's definition. That case was Justice Peckham's introduction to the Supreme Court of the United States of the doctrine of liberty of contract as a tool to void state regulation.

Enshrining liberty of contract as part of liberty gave a Spencerian "scientific" derivation to the bounds between the exercise of the police power and the freedom of the property owner to do as she will. Implicit in this version of the

100. Spencer "urged the elimination of public education, sanitation laws, and the public postal system." Benedict, *supra* note 28, at 301. At the time, these proposals appeared extreme.

101. It was to this position of Spencer's that Holmes' famous comment in his dissent in *Lochner* was addressed: "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," 198 U.S. 45, 75. Holmes, too, seems to have believed that social evolution rested on the struggle for survival among individuals: "The struggle for life . . . does not stop in the ascending scale with the monkeys, but is equally the law of human existence." Holmes, *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873).

102. 1 SFC, *supra* note 8, at 76.

103. H. SPENCER, SOCIAL STATICS 94 (1851), cited in LPP, *supra* note 8, at 67.

104. LPP, *supra* note 8, at 67.

105. Spencer later explicitly identified liberty with liberty of contract, but that was not until his 1891 work, JUSTICE; see Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455 (1909).

106. 1 SFC, *supra* note 8, at 76 n.1.

107. 165 U.S. 578 (1897). Justice Peckham there defined liberty as:

[N]ot only the right of a person to be free from physical restraint . . . but to be free in the enjoyment of all his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to carry out . . . the purposes above mentioned.

*Id.* at 589.

*sic utere* principle, which speaks only of one's duties regarding the use of one's property and the safeguarding of others', is that property owners owe no duties to non-owners. Consequently, the police power is only available to order relations between property owners. The police power emphatically does *not* serve to create a relation between property owners and non-property owners through the state transferring power to, or serving as stand-in for, the latter. In essence, the state can and should act as umpire among property owners through its exercise of police power, and particularly between large and small property owners, but the state is not to interfere between those who do and do not own property.

## VI. TIEDEMAN'S CONSTITUTIONAL PHILOSOPHY

With scientific sanction for the rule of *sic utere*, Tiedeman's answer to the majoritarian dilemma was the formulation that the Constitution should be read as limiting government action in respect to property to the exercise of the police power to protect individual property owners from one another. It is that which amounts to the public good. But popular acceptance of a Constitution that was inherently property-protective rested on the public's belief that the self-regulated economy operated fairly; Tiedeman believed economic concentration challenged this belief and, because popular opinion made the law, this threat was a serious one.

### A. *The Organic Constitution*

In *The Unwritten Constitution*, Tiedeman presented his claim that it was the popular consensus that makes the law. The book was written when populist sentiment was widespread in Missouri, a state well known for its hostility to economic concentration, and seems to reflect the threat to the institutions of private property which that sentiment posed.<sup>108</sup> In lectures before the Missouri State Bar Association in 1887, 1888 and 1889, published in book form in 1890 as *The Unwritten Constitution*, Tiedeman presented a conservative view of the Constitution as protecting private property, but cautioned that such protection could last only as long as popular sentiment favored it.

Tiedeman adopted a historicist approach to law as an evolving product of human society. A legal rule is not the earthly expression of some Platonic code, but "the product of social forces, reflecting the prevalent sense of right."<sup>109</sup> Thus, what we call law requires not only the Austinian sovereign's power to declare law, but the power to command public opinion toward its obedience. Indeed, that power seems to him the central fact of sovereignty. "[S]ince all law derives its binding authority from the present commands of those who now control and mould public opinion, and not from any original compact or consent of the governed, the supreme power is in that aggregation of individuals, which now has the ability to enforce obedience to its commands."<sup>110</sup> The mere ability

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108. See THELEN, *supra* note 12, at 205-65; PIOTT, *supra* note 12.

109. UC, *supra* note 8, at 9.

110. *Id.* at 125.

to make law is not the ability to get it obeyed. "[T]he life of a rule of law is derived from its habitual and spontaneous observance by the mass of people."<sup>111</sup> People acquiesce in the enforcement of laws because the "legal rule is . . . fashioned after the prevalent sense of right,"<sup>112</sup> but "laws will cease to be enforced as soon as public opinion, under the operation of social forces, undergoes a change. . . ."<sup>113</sup>

His rejection of law as the protector of natural rights, including the right of property, is stark: the idea of natural rights is simply the unconscious product of widespread social agreement as to what rights will be respected.<sup>114</sup> There are no rights unrecognized by the popular will, "no such thing, even in ethics, as an absolute, inalienable, natural right. The so-called natural rights depend upon, and vary with, the legal and ethical conceptions of the people."<sup>115</sup> Thus, "there is no fixed, invariable list of natural rights . . . . Indeed, the natural rights with which all men are proclaimed . . . to be endowed by their Creator, have been developed within the historical memory of man."<sup>116</sup> While Tiedeman now wholly rejects the doctrine of natural rights (in contrast to his less absolute 1886 assertions regarding "human and . . . natural law"<sup>117</sup>), he believes it is a good thing that the Constitution uses natural rights language, because "the popular reverence for the written word"<sup>118</sup> restrains challenge to the rights of property contained therein. It is important to maintain that popular reverence because it is all that protects socially-created rights.

Although Tiedeman admitted he was at one time persuaded by Bentham that law was made by judges,<sup>119</sup> he came to believe that courts and legislatures neither make nor discover law; they mirror what the community wishes the law to be:

[A]ll law . . . whether it takes the form of statute or of judicial decision, is but an expression of the popular sense of right . . . . [N]either the judge nor the legislator makes living law, but only declares that to be the law, which has been forced upon them, whether consciously or unconsciously, by the pressure of the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society.<sup>120</sup>

Even the Constitution is an organic document (hence the title, *The Unwritten Constitution*), and is understood as public opinion wishes it to be at any particular time. Indeed, legislative intention is all but meaningless:

111. *Id.* at 6.

112. *Id.* at 7.

113. *Id.* at 121.

114. *Id.* at 6.

115. *Id.* at 76.

116. *Id.* at 73.

117. LPP, *supra* note 8, at 2. Although Tiedeman began the second edition of the police power treatise by adverting to "the private rights of the individual . . . [which] are natural rights, rights recognized and existing in the law of reason" (1 SFC, *supra* note 8, at 1), in a footnote to that statement, he said that he was referring merely to those "conceptions of natural rights which have by adjudications been embodied in American constitutional law." 1 SFC, *supra* note 8 at n.1. For a "scientific" critique of natural rights theory, he refers the reader to THE UNWRITTEN CONSTITUTION, where, he says, it is "properly recognized and discussed." *Id.*

118. UC, *supra* note 8, at 136.

119. *Methods of Legal Education*, *supra* note 13, at 154.

120. *Id.*



[T]he judge or practitioner of the law, who would interpret the law right, i.e., ascertain with precision the rule of conduct in any case, need not concern himself so much with the intentions of the framers . . . as with the modifications of the written word by the . . . present will of the people.<sup>121</sup>

Judicial review then is essentially the task of understanding not what the legislature intended, but "what the popular will intends by the written word."<sup>122</sup> Consequently, the idea that the protection of private property is embedded in the Constitution is safe only so long as society accepts it.

Tiedeman uses the evolution of the contract clause as an example of his point that the constitutional guarantees of private property are not fixed and certain, but changing. The public accepted, even desired, the protection afforded private initiative by the legislative restraint John Marshall read into the contract clause in *Dartmouth College*.<sup>123</sup> But that decision restrained public improvements as well and had to be modified. Thus, in the *Charles River Bridge* case, "[t]he public pressure in favor of the second bridge was so great"<sup>124</sup> that the Court decided the legislative grant of a second franchise would not be an impairment of contract. The meaning of the contract clause itself changed because public need and public opinion required the change. There was "a change in public opinion, and a consequent change in the constitutional rule."<sup>125</sup>

#### B. *The Antimajoritarian Constitution*

Tiedeman is not arguing simply that the Constitution has a preference for dynamic uses of property over static ones; he is making the more difficult point that the Constitution is indeterminate. This rather modern view of the Constitution was not an optimistic one; such a Constitution was itself at the mercy of political majorities, not a bulwark against them. The protection of private property required that public opinion be recognized and afforded deference. "Of what value then," Tiedeman asks, "is a written constitution?" And answers, "[T]he real value of the written constitution . . . [is that i]t legalizes, and therefore makes possible and successful, the opposition to the popular will."<sup>126</sup> In other words, it creates a judiciary:

[A]ll these checks and balances, set down in a written constitution, would be unavailing, if the means of securing their observance were not likewise provided in the exalted and extraordinary power of the courts to declare when a law, passed by the Congress, or an act, committed by an official, is in contradiction of some provision of the Constitution.<sup>127</sup>

This is a peculiar view of the Constitution; it is a document that is interpreted as public opinion understands it, but it also provides a means to withstand public opinion.

121. UC, *supra* note 8, at 151.

122. *Id.* at 153.

123. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); UC, *supra* note 8, at 55-56.

124. UC, *supra* note 8, at 57.

125. *Id.* at 66.

126. *Id.* at 163.

127. *Id.* at 159.

### C. *Stare Decisis as a Limitation on Majorities*

The instability inherent in this view of the Constitution later led Tiedeman to support a form of codification as a means of fixing the law beyond the power of majorities. Even the judiciary was too willing to bow to public opinion. Successful opposition to the popular will required, he believed, some limitations on judicial discretion. An 1896 paper read to the New York State Bar Association<sup>128</sup> used *stare decisis* as the starting point of an examination of ways to limit the judiciary.

*Stare decisis* makes some sense because it is founded "in the intense and just desire to secure uniformity and certainty in the enforcement and application of the law."<sup>129</sup> Why has *stare decisis* "acquired such a mastery over the Anglo-Saxon juridical mind, that it excludes everything else except statutes, from consideration as . . . law?"<sup>130</sup> Tiedeman gives an answer worthy of any Realist:

The rule of *Stare Decisis* . . . serves the purpose of protecting vested interests against any popular attacks exerted through a change of judicial opinion . . . . The protection to vested interests and the ascertainment of certainty in the administration of the law are held to be paramount to the ascertainment of absolute right and justice in the particular case.<sup>131</sup>

He saves himself from radicalism by claiming that "vested interests are and have been more seriously threatened among Anglo-Saxon peoples by the onward march of Democracy than among other peoples."<sup>132</sup> Thus, in English-speaking countries, the concern for vested interests over "absolute right and justice"<sup>133</sup> is justified. "So far as the doctrine of *Stare Decisis* serves the purpose of a brake on the wheels of democracy, with its socialistic and other more or less revolutionary demands for change, it is a precious heritage of the common law, and should be jealously guarded against destruction or abrogation."<sup>134</sup>

But is *stare decisis* the only means to this end? "[T]he answer to that question cannot be so certain . . . when we remember that in no other jurisprudence, known to mankind, was the same importance and effect given to judicial utterances."<sup>135</sup> The problem with *stare decisis* is that it does too much. It enshrines merely personal reasoning of judges as part of the law, when in fact it is only the ruling which is law. What is really needed is that judges be "charged with the duty of formulating a scientific, and hence comparatively exact, analysis and exposition of the law, as it has been evolved in the course of actual litigation out of the national will."<sup>136</sup> This is not, he says, a recommendation for

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128. *Stare Decisis*, *supra* note 14, at 103.

129. *Id.* at 107.

130. *Id.* at 112.

131. *Id.* at 113.

132. *Id.* at 114.

133. *Id.* at 113.

134. *Id.* at 114.

135. *Id.* at 109.

136. *Id.* at 121.

codification, but rather for "[an] official analysis and exposition of the law,"<sup>137</sup> and should be the product of:

[a] commission, composed of the ablest jurists of the State . . . who shall be charged with the reduction of the existing law to the form of commentaries on the different branches of the law, and . . . to issue annuals, in which the judgments of the courts during the current year will be analytically explained in the light of their exposition of the existing law, and the modification stated, if any, which the new case has made in the prior law.<sup>138</sup>

In other words, something like the Restatements. In light of his earlier formulations that law is made by popular agreement and that those who create agreement create the law, the call for a codification must be seen as an essentially antimajoritarian attempt to retain the power to create agreement and eliminate contingency, at a time when public hostility seemed to endanger property rights.

#### D. *Preserving Private Property in a Majoritarian State*

As demonstrated by his view of the Constitution and his call for codification, Tiedeman was obviously troubled that the law was contingent upon public opinion, for it meant property rights depended on a potentially fickle social consensus.<sup>139</sup> While he did not believe that fundamental rights were derived from natural law, the character of the rights fundamental to the well-being of the polity remained the same: "[F]reedom from all legal restraint that is not needed to prevent injury to others,"<sup>140</sup> a doctrine Tiedeman derived from Spencer, the Magna Carta and American constitutions, state and federal,<sup>141</sup> is the key. But the public consensus supporting the fundamental right of freedom from restraint is endangered:

Under the stress of economical relations, the clashing of private interests, the conflicts of labor and capital, the old superstition that government has the power to banish evil from the earth, if it could only be induced to declare the supposed causes illegal, has been revived; and all these so-called natural rights, which the framers of our constitutions declared to be inalienable . . . are in imminent danger of serious infringement.<sup>142</sup>

A consensus theorist, Tiedeman rejected the supernatural framework of natural law, but then faced the problem of the protection of the institutions he most valued when the consensus began to disintegrate. Tiedeman's answer was that the demand for change springs from the growth of great concentrations of capital—an unsatisfactory situation that needs to be corrected.

[A]n unmistakable, and general and popular condemnation of the strong and apparently irresistible tendency to the concentration of capital, and of the gigantic economic

137. *Id.* at 127.

138. *Id.* at 128.

139. In this, Tiedeman reflected the views of his mentor, von Jhering, who had written: "There is no absolute property, i.e., property that is freed from taking into consideration the interest of the community, and history has taken care to inculcate this truth in all peoples." R. VON JHERING, *DER GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (4th ed. 1978), cited in Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1 ILL. L. REV. 41 (1986).

140. UC, *supra* note 8, at 76.

141. *Id.* at 76-78.

142. *Id.* at 79.

power which such concentration creates . . . seems to me to explain the real force which is back of the anti-trust legislation, and without whose support the socialistic propaganda could not get a hearing.<sup>143</sup>

## VII. CONCENTRATION AND MONOPOLY

The property Tiedeman was interested in preserving was precisely *private* property, that is, the property of individuals. He had argued for the limitation of the police power only as it applied to the regulation of small business, what he called "trades and professions."<sup>144</sup> The forces of economic concentration threatened small business, both directly by making it uneconomic, and indirectly by arousing opposition among the propertyless to the very institution of property. A growing dissatisfaction with economic concentration could lead to a threat to property generally. Nationalization of one form of property was necessary to protect the institution of private property itself. This is the underpinning of his apparently paradoxical belief that government takeover of big business was needed to restrain socialism.

### A. *Privileged and Virtual Monopoly*

In Tiedeman's view, monopoly had two faces—the "legal franchise or monopoly, acquired by enactment of the legislature . . ." and the "particular trade or calling . . . so circumstanced as to amount to a virtual monopoly . . ."<sup>145</sup> The former was a creature of the state, the latter of private enterprise; the former was a privilege granted by the state and could be regulated, even to the point of taking, the latter, simply property, should be free of regulation.<sup>146</sup> As to what constituted a public franchise, and thus a regulable monopoly, Tiedeman's view was broad. As a theoretician of the smallholders, Tiedeman's great enemy was the monopoly created by government. Most monopolies were the product of dishonesty or privilege,<sup>147</sup> including the privilege of incorporation. "It is only in extraordinary abnormal cases that any one man can acquire this power [of monopoly] over his fellow-men, unless he is the recipient of a privilege from the government, or is guilty of dishonest practices."<sup>148</sup>

The privilege to create a monopoly may be granted by the state in the exercise of its police power, that is to say, for the public good, but it can also be

143. 1 SFC, *supra* note 8, at 407. Tiedeman seems to have used the word "socialistic" as the economist Francis Walker did: "I should apply the term 'socialistic' to all efforts, under popular impulse, to enlarge the functions of government, to the diminution of individual enterprise, for a supposed public good," F. Walker, 2 *Discussions in Economics and Statistics* 250 (1899), cited in Benedict, *supra* note 28, at 306.

144. 1 SFC, *supra* note 8, at 239.

145. Tiedeman, *Police Regulations of Trade Combination*, 2 INTERCOLL. L.J. 109, 110 (1894).

146. See Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984), for a clear discussion of the distinction between property and privilege in nineteenth-century liberal economic thought and the jurisprudential consequences of the distinction.

147. The view that "[o]nly criminal activity or legal privilege enabled enterprises to achieve market dominance" was generally characteristic of nineteenth-century liberal economic theory. Siegel, *supra* note 146, at 191.

148. 1 SFC, *supra* note 8, at 354. In *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 811-12 (1892), the court, citing to the first edition of the police power treatise, quoted this language in *upholding* the power of the legislature to protect miners by prohibiting mining corporations from paying their employees in scrip.

retracted when the public good demands it. The monopoly business created by privilege might be hemmed about, in ways that other kinds of businesses would not be. "A special privilege or franchise is granted to individuals because of some supposed benefit to the public, and in order that the benefit may be assured to the public, the State may justly institute regulations to that end."<sup>149</sup>

But the same logic does not apply to natural, or what he calls "virtual," monopolies when it comes to the ability of the state to regulate them. "[T]he State can, and indeed it is its duty to, subject to police control a monopoly, created by law . . . [But this does not] justify the application of [this] rule . . . to a business, which is a virtual monopoly, but is not made so by law."<sup>150</sup> A business which can be operated without state concession (in essence, without incorporation)<sup>151</sup> is not subject to regulation, regardless of whether it is a monopoly. Police regulation ought not to be allowed where "no special privilege or franchise is enjoyed, and in which there is no legal monopoly, but in which the circumstances conspire to create in favor of a few persons a virtual monopoly out of a business of supreme necessity to the public."<sup>152</sup> And the mere declaration by the legislature that the prosecution of a business is a privilege is not enough to justify regulation. "If it be without legislation a natural right, no law can make it a privilege by requiring a license. The deprivation of the natural right to carry on the business must be justifiable by some public reason or necessity."<sup>153</sup> Small business has the right to operate unregulated since it does not owe its existence to government grant or fiat.

In Tiedeman's view, which was derived from the tradition of the common law as it had been received in America,<sup>154</sup> the corporate form was not a natural one, but a creation of the law, and thus quasi-public. "[T]he very creation of the corporation . . . may be considered a special franchise."<sup>155</sup> Writing before *Santa Clara*,<sup>156</sup> he argued that the "rights and powers of a corporation depend altogether upon the will of the legislature"<sup>157</sup> and that corporations are not equivalent to individuals in their freedom from regulation. Corporations, which require legislative charter, are the creatures of a privilege which may be withdrawn or modified where the public requires it.<sup>158</sup>

149. 1 SFC, *supra* note 8, at 303.

150. *Id.* at 299-300.

151. See *infra* text accompanying notes 202-06.

152. 1 SFC, *supra* note 8, at 304.

153. *Id.*

154. "Our legal tradition began by regarding corporate status as uniquely created by the sovereign's action and existing strictly on the sovereign's terms." HURST, *supra* note 74, at 156.

155. 2 SFC, *supra* note 8, at 977.

156. *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886), was the case in which the Supreme Court of the United States announced that for the purposes of the fourteenth amendment, corporations were to be considered persons, rather than creations of the state. They had the rights of persons and could not, without due process, be deprived of them.

157. LPP, *supra* note 8, at 354.

158. The distinction, in Jacksonian legal thought, between ordinary property and that created by privilege, grant or franchise is discussed in Siegel, *supra* note 146, at 189-93, as well as Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and 'Takings' Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 55 *passim* (1986). "Property . . . stood in contrast to privilege, which signified wealth that only certain individuals could acquire, usually through designation by affirmative governmental act," *Id.* at 58.

His favored position, even after *Santa Clara*, remained that corporations were not wholly private, if they received public support in the form of eminent domain or franchises. When a grant of a special privilege or franchise is necessary to the conduct of a business, it could be regulated in ways non-privileged enterprises or individuals could not:

Whenever the business is itself a privilege or franchise, not enjoyed by all alike, or the business is materially benefited by the gift by the State of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a *quasi* public business, and to that extent may be subjected to police regulation.<sup>159</sup>

### 1. *Munn*

Thus Tiedeman was opposed to the *Munn*<sup>160</sup> doctrine that individual non-privileged businesses could be regulated when "clothed with the public interest."<sup>161</sup> The *Munn* case, he recognized, implied a public interest in private property *sans* any affirmative act of the state.

There was no particular franchise involved, yet the Supreme Court held that because [the owners of grain elevators] had it in their power to compel people to pay what they were pleased to charge, the state had the right to institute regulations of the price of storage . . . . To my mind it constitutes a landmark in legal history.<sup>162</sup>

The *Munn* doctrine was dangerous: "Under this rule, the attainment of the object of all individual activity, viz.: to make oneself or one's services indispensable to the public, furnishes in every case the justification of State interference. Only the more or less unsuccessful will be permitted to enjoy his liberty without governmental molestation."<sup>163</sup> The logical extension of *Munn* would be that the state could never be ousted as a regulator of successful business, whether or not the business had obtained state subsidy, so long as the business could be defined as one clothed with the public interest.

Tiedeman relied upon the limitations of the police power as a brake on state regulation, rather than whether an enterprise was or was not affected with a public interest.<sup>164</sup> The overarching principle was that the affirmative intervention of the government on behalf of a business meant it had no fundamental right to autonomy. A subsidized business could be regulated, an unsubsidized one could not. The deciding factor was not the existence of the monopoly, but

159. 1 SFC, *supra* note 8, at 303.

160. *Munn v. Illinois*, 94 U.S. 113 (1877).

161. *Id.* at 126.

162. *Trade Combination*, *supra* note 145, at 111.

163. LPP, *supra* note 8, at 235. Tiedeman's *in terrorem* argument against the *Munn* doctrine is its possible extension to wages:

One would be likely to think that, if it was lawful for the State to regulate the rate of charges, which an elevator owner may charge for the storage of grain, because the elevator, on account of the necessities of the shipper, was a virtual monopoly; it would be equally lawful for the State to regulate the rate of all wages, by establishing a minimum rate of wages, because work is necessary to the life of the workman and his family, and the possession of capital makes the capitalist or employer a virtual monopolist.

1 SFC, *supra* note 8, at 317.

164. Not until *Nebbia v. New York*, 291 U.S. 502, 531 (1934), did the Court decide that "affected with a public interest" meant, in essence, subject to the exercise of the police power.

how it came into being. Here, he locates himself between, on the one hand, Justices Miller and Waite, who wrote the *Slaughterhouse Cases* and *Munn* respectively, representatives of old ways of thinking about the dominant role of government in the economy,<sup>165</sup> and Justice Field, on the other, who dissented in both cases,<sup>166</sup> in what is considered a fashion representative of the new attitude toward economic growth free of government support or interference.<sup>167</sup> Tiedeman supported Miller and Waite in the *Slaughterhouse Cases* and Field in *Munn*. On the one hand, when the public good required it, the state could create an artificial monopoly, as Louisiana had by restricting the locations in which animals could be slaughtered, and, more to the point, could regulate it; on the other hand, a naturally-occurring monopoly, like Munn's grain elevators, should remain free of state control.<sup>168</sup>

## 2. *Slaughterhouse*

Tiedeman believed that the *Slaughterhouse Cases* were rightly decided, although he, as much as Field, believed in the right of *individuals* to pursue any lawful calling, unhampered by government intervention.<sup>169</sup> Field has been viewed in *Slaughterhouse* as applying Jacksonian principles of natural rights and individual liberties to the economic questions of the late nineteenth century.<sup>170</sup> But Field did so as a proponent of an expanding economy, rather than, like Tiedeman, as a representative of a constituency to whom the expansion of the national economy was less important than retaining their place within it. Although Field's position in the *Slaughterhouse Cases* lent support to the butchers, and Tiedeman's to the corporation that was the beneficiary of state regulation, the consequence of the adoption of Field's position was, in the long run, the aggrandizement of the corporate sphere at the expense of the individual entrepreneur.

165. On Miller, see G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 87-91 (1976); on Waite's opinion in *Munn*, see Siegel, *supra* note 146, at 195-99.

166. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 83 (1872) (Field, J., dissenting); *Munn*, 94 U.S. at 136 (Field, J., dissenting).

167. Horwitz, *supra* note 25, at 684.

168. It is worth noting that Tiedeman's support for the economic principles implicit in the *Slaughterhouse* decision was shared by the laissez-faire oriented magazine *The Nation*, which feared, as Tiedeman did, that a contrary outcome would insulate special privilege from government control. *The Nation* 11 (Dec. 1, 1870), cited in R. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* 162 (1985); but see Siegel, *supra* note 146, at 203 n.3, noting the opposition of Herbert Croly, *The Nation's* editor, to Justice Waite's reasoning in *Munn*.

169. Tiedeman's adherence to the decision in the *Slaughterhouse Cases* was also based on his notion that the framers of the fourteenth amendment did not fully understand the extent to which it magnified federal power and, had they understood that, would have written it differently. The "bold and courageous" action of the Court in that case was necessary to avert a "disastrous result," UC, *supra* note 8, at 102.

If the constitutional amendment had been allowed to have its full literal effect, the end obtained would be . . . the establishment of a strong national government and the subjection of the States to the condition of provinces . . . Feeling assured that the people in their cooler moments would not have sanctioned the far-reaching effects of their action, . . . the court dared to withstand the popular will as expressed in the letter of this amendment.

*Id.* at 101-03. The Court's action here, he concluded, "furnishes one of the most striking proofs of the thesis, that political constitutions are a growth, evolved from all forces of society, both material and spiritual." *Id.* at 107.

170. McCurdy, *supra* note 67, at 973.

Tiedeman, a proponent of the freedom of individuals from regulation, did not find it easy to explain his opposition to the butchers' position in the *Slaughterhouse Cases*:

[I]t is not difficult to determine on principle that the grant of privileges not otherwise acquirable may be made a monopoly, but that a monopoly cannot be made of the ordinary lawful occupations. The difficulty becomes almost inexplicable, when the exclusive privilege is granted of carrying on a business, which is prohibited to others, because the unlimited pursuit of it works an injury to society.<sup>171</sup>

But he was able to clarify his position in his last article:

[I]t may happen that a trade or business is inimical to the public welfare only when it is left open to all who may choose to follow it; and that the menace to the interests of the commonwealth may be eliminated by the prohibition of such trade or business to individuals, and the grant to a few of the exclusive right to carry on the trade or business as a statutory monopoly.<sup>172</sup>

Concretely, his support of the Louisiana legislation was based on the traditional police power doctrine that a lawful business may nonetheless be regulated as to location. "[W]here the public interests require it, ordinary callings and businesses may be converted into more or less exclusive monopolies the same principle applies to those cases, where the law provides that a particular trade shall be conducted in certain buildings or localities."<sup>173</sup> If the state, for example, may declare that markets can only be conducted in a public market building, it can authorize a private individual or corporation to maintain the market. "The monopoly, thus created, is not any more objectionable on principle, because it does not interfere to any greater degree, or in any different way, with the liberties of others who are prohibited, than the erection and maintenance of such buildings by the government."<sup>174</sup> Thus:

If the State has the constitutional power to prohibit the prosecution of such a trade in all other buildings, the prohibition is equally irksome, whether the [permitted] buildings are owned by the public or by private individuals; and the grant of the right to prosecute an otherwise prohibited trade in the buildings of a private individual or corporation would create a privilege, and may therefore be made a monopoly.<sup>175</sup>

In such a case, what has been created "is not a common natural right because it cannot be prosecuted without the aid of a legal privilege."<sup>176</sup>

His support for the *Slaughterhouse* decision was not backing for government creation of monopolies, but for government control and regulation of monopolies created by privilege. "[T]he grant of the franchise makes the corporations legal monopolies, as against the public, and consequently they become subject to police regulation, in order to protect the public from extortion."<sup>177</sup> That protection could include government takeover. A monopoly acquired by one's own successful efforts is not restrainable, but where the government cre-

171. 1 SFC, *supra* note 8, at 573.

172. *Government Ownership*, *supra* note 17, at 477.

173. 1 SFC, *supra* note 8, at 578-79.

174. *Id.* at 579.

175. *Id.*

176. *Id.* at 562.

177. 2 SFC, *supra* note 8, at 274-76.



ates a monopoly by a grant or franchise for a public purpose, it may, of course, regulate it. And the government can take over the monopoly where its retention in private hands is at cross-purposes with the public interest.

### B. *Government Takeover of Privileged Monopolies*

It was precisely from the constitutional objections to grants of monopolies that Tiedeman derived the justification for takeover. There were two such objections, he reasoned. First, the grant of a monopoly violates the liberty of contract of individuals foreclosed from a particular enterprise by the grant to another. Second, the grant amounts to anti-competitive governmental largesse to a particular citizen to the exclusion of others and thus violates the constitutional guaranty of equal privileges and immunities for all citizens.

The first objection he answered in his defense of the *Slaughterhouse* decision, saying that a grant in aid of a business which could not be otherwise conducted violated no one's liberty to undertake the business. Without the grant, no business existed. But the second objection was more compelling. Why should a government privilege like the grant of eminent domain be given to a few individuals who are thus advantaged in the economic competition?

Granted that individual capitalists cannot be allowed indiscriminately and without restraint to exercise the right of eminent domain, and to tear up the streets of a city in order to lay down conduits, pipes, and tracks; it does not necessarily follow that the right to do these things should be granted as a private monopoly to a few persons or corporations.<sup>178</sup>

Of course, "[i]f there was no other alternative to the creation of such private monopolies but the denial of these conveniences and necessities to the people, the law of overruling necessity would amply justify this patent and unmistakable violation of our constitutional guaranty of equal privileges and immunities."<sup>179</sup>

However, there is another very feasible alternative. "It is this: whatever business or industry cannot be left open to the free choice of all persons without favor or discrimination . . . should and can be made a government monopoly, instead of being granted to private individuals or corporations."<sup>180</sup>

This might have happened in the early Republic, but public opinion was not ready for it. The expansion of the American economy, particularly with respect to transportation and communications, he says, "arose at a time when the *laissez-faire* philosophy was in complete ascendancy, when the popular mind would have been startled by the proposition that the government should

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178. *Government Ownership*, *supra* note 17, at 481. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329, 360-73 *passim* (B. Bailyn & D. Fleming ed. 1971), has pointed out the extent to which eminent domain powers indeed amounted to a subsidy to individual entrepreneurs who prospered by providing infrastructural development with the aid of the grant of that power. At the same time, the undoubted public benefit derived from subsidies to private enterprise destabilized the notion of strict egalitarianism in the relation of government to its citizens.

179. *Government Ownership*, *supra* note 17, at 481.

180. *Id.*

embark in the business of railroading."<sup>181</sup> Thus, rather than the government taking land for public use, "[t]he legal profession came to the rescue and suggested that 'public use' must be interpreted, in determining the limitations of the right of eminent domain, as meaning 'public good' or 'public purpose'; and the railroad was declared to be a quasi-public corporation."<sup>182</sup>

The constitutional pledge of equality depends on the government not favoring one person over another; that can only be assured by making necessary monopolies government owned. "There is only one way whereby the seeming equality of all men may be established in these conspicuous cases of governmental favoritism to the stronger; and that is, the conversion of all of these necessary monopolies from private into government monopolies."<sup>183</sup> The government grant which creates a private, but necessary, monopoly amounts to unequal favoring of one citizen over another; if the public good requires a monopoly, the public should own it. Going to what is for him the heart of the matter, the interests of smallholders, he says that government grants threaten small-scale enterprise and policymakers should take that into account:

[T]he Supreme Court of the United States extols the idea of preserving from extinction the small tradesman, artisan, and manufacturer, and the consequent limitation of the concentration of large wealth into the hands of a few. But can this judicial and legislative attitude be reconciled with the grant to private individuals and corporations of valuable franchises by which they are enabled to accumulate vast fortunes in supplying the necessities of the people?<sup>184</sup>

It was of no concern to him that concentration resulted in economies of scale that could reduce costs to consumers. Like the "old conservative" majority on the Supreme Court,<sup>185</sup> his constituency was smallholders, not the growing class of employee-consumers. It is not the proper goal of courts or legislatures:

that the prices of products should be reduced at the expense of the liberty of the individual to pursue a lawful calling; . . . [but] it is the concern of the government, which is manifested by the legislation against trusts and trade combinations, that the small tradesman, manufacturer and artisan, shall not be driven to the wall, overpowered by the giant combinations.<sup>186</sup>

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181. *Id.* at 478. This, of course, now appears historically inaccurate; see *supra* text accompanying notes 80-82.

182. *Id.* at 478 (citations omitted).

183. *Id.* at 483.

184. *Id.* at 482.

185. See, Horwitz, *supra* note 25, at 686.

The opinion of the Court in the *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), written by Justice Peckham, sounded themes with which Tiedeman could not but agree; according to the Court, the nation suffered when combination "depriv[ed] it of the services of a large number of small but independent dealers . . . . [It was] not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation . . . ." *Id.* at 324.

Peckham shared Tiedeman's view that there was an important difference between pro- and anti-competitive combinations of capital, and argued that the latter were in restraint of trade. *Id.* at 323-24. The dissent in the case criticized Peckham's position as a blow to liberty of contract. *Id.* at 355 (White, J., dissenting). It was Peckham who had first used the doctrine of liberty of contract to strike down state legislation in the Supreme Court the previous year in *Allgeyer*. See *supra* text accompanying note 107.

186. 1 SFC, *supra* note 8, at 611. Tiedeman also urged that courts could not coherently utilize the individualist doctrine of liberty of contract to restrict legislative interference with business without also being willing to restrain monopolies:

Opponents may urge, Tiedeman says, that nationalization will lead to socialism. In fact, takeover of monopolies will *block* socialism:

The socialistic antipathy which is now so prevalent to the appropriation by private capitalists of any of the profits of labor, as labor agitators estimate and describe them, and which is so powerful a lever for the creation of discontent in the case of private employment, would then be absent, inasmuch as the profits of the business of railroads, telegraphs, electric and gas-light plants, etc., would then be taken by the government for the benefit of the whole people.<sup>187</sup>

The answer to the demand for socialism, the way to preserve a competitive capitalist economy, is for the government to take over big business and its profits. No doubt many were taken aback by this conclusion.

Tiedeman's call for nationalization was not simply a product of the tensions of the nineties. In the eighties, while in Missouri, he had apparently lent some support to the movement for state control of public utilities by refusing to describe as unconstitutional the proposal that municipal governments operate public utilities.<sup>188</sup> In the first edition of the police power treatise published in 1886, Tiedeman had suggested that the Supreme Court would find it "a legitimate assumption of power for the United States to make a government monopoly of the management of railroads and the telegraph, and appropriate to its use the existing lines of railroad and telegraph."<sup>189</sup> His justification then was that it was likely to prove a way of controlling "collision[s] between the capitalist and the workingman."<sup>190</sup> And he preempted criticism by arguing that such nationalization would not be a model for redistributive "attempts . . . to create monopolies out of trades and occupations, the prosecution of which by private individuals and corporations would not necessarily inflict injury upon the public."<sup>191</sup>

These themes, tentative and unformed at the outset, more urgent at the close, remain consistent from 1886 to 1903; they reflect the smallholder's response to the concentration and oligopoly of the post-war period and, in their development, suggest that Tiedeman had concluded at a relatively early date that there was no way to block the expansion of big capital except through big government. The nineteenth-century liberal language of property rights, which drew distinctions between that which was earned, property, and that which was granted, privilege, supported the conclusion that the latter could be nationalized, not for redistributive purposes, but to protect the former.

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It is certainly a case of judicial inconsistency to deny to the legislature the right to interfere with the liberty of contract of the individual for the purpose of regulating the price of wages and goods, and at the same time to increase the natural power of control which the capitalist, by the mere possession of his capital, already has over the rest of his fellow-citizens, by granting to him a privilege or franchise to supply a common and universal necessity.

*Government Ownership*, *supra* note 17, at 482.

187. *Id.* at 490.

188. These proposals were controversial ones which excited Missouri public opinion in the late eighties. *PROTT*, *supra* note 12, at 21-26. According to Tiedeman, he was criticized by other lawyers for his stand on this issue. *Dictum and Decision*, *supra* note 14, at 36.

189. *LPP*, *supra* note 8, at 326.

190. *Id.* at 327.

191. *Id.*

## VIII. COMPETITION

Though he supported the regulation of combinations, cartels and trusts, Tiedeman did not consider regulation of the marketplace a sufficient substitute for takeover. Antitrust laws do too much; they bar both combinations which restrict competition *and* those which preserve it. Most antitrust statutes he regarded as "ill-considered and poorly constructed legislation on a problem which reaches so deep down into the mysteries of human desires, and which is so completely within the control of the inexorable laws of nature, and the social forces."<sup>192</sup>

A. *Competition Among Businesses*

Tiedeman explained these inexorable antitrust laws at length in the second edition of the police power treatise.<sup>193</sup> Some combinations of businesses preserve competition by preventing the strongest or most daring among them from seizing the field.

[W]here there is no . . . purpose to create a monopoly, but only the lawful purpose of putting an end to litigation of rival corporations over their conflicting interests, the consolidation of the corporations is not illegal, as tending to create a monopoly, particularly, when the corporations hold no public franchise, like a railroad, and their output comprises but a small portion of the same product. . . .<sup>194</sup>

This sort of combination is *pro*-competitive, while trustification is clearly anti-competitive.<sup>195</sup>

But *both* pro- and anti-competitive combinations are banned by an interpretation of antitrust laws as barring *all* contracts in restraint of trade. Such laws reveal the "general and popular condemnation of the strong and apparently irresistible tendency to the concentration of capital and of the gigantic economic power which such combination creates."<sup>196</sup> However:

[T]o be effective in restraining the growth and enlargement of combinations of capital, [anti-trust statutes] must be so reconstructed as to remove their present antagonism to economic and industrial necessities [pro-competitive combinations]; or these necessities themselves must be changed by new inventions and the discovery of new methods of manufacture of business, whereby it becomes possible for the small dealer and manufacturer to sell his goods and products to the consumer as cheaply as can the large dealer and manufacturer.<sup>197</sup>

The real solution is not antitrust laws, but government takeover and limits on incorporation. Tiedeman came to oppose the corporate form itself which had,

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192. 1 SFC, *supra* note 8, at 465.

193. Chapter IX, *Regulation of Trades and Occupations*, which dealt with the problems of competition and concentration in the economy, grew from 134 pages in LPP, the first edition of the police power treatise, to 380 in SFC, the second.

194. 1 SFC, *supra* note 8, at 406-07.

195. *Id.* at 382-87.

196. *Id.* at 407.

197. *Id.* at 407-08.

by then, lost its character as a creation of the state,<sup>198</sup> or at least to urge its severe constraint:

[A]ll attempts to suppress and prevent combinations in restraint of trade must necessarily prove futile, as long as the statutes of the State permit the creation of private corporations, for the prosecution of businesses, which can be successfully carried on by private individuals without the aid of a charter of incorporation . . . I advocate, as a return to a uniform recognition of the constitutional guarantee of equality before the law, the repeal of statutes which provide for the creation of private corporations.<sup>199</sup>

The maintenance of a competitive economy, he believed, required denying the right of free incorporation, for it was that which led to giant combinations.<sup>200</sup> The long-term remedy for anti-competitive monopolization was for much narrower incorporation laws that "limit the capital and volume of business of a corporation."<sup>201</sup> Businesses like banks and insurance companies, which, because of capital requirements, could only be operated as corporations, should be taken over by government whether monopolies or not.<sup>202</sup> But any business which could be operated without incorporation could not be nationalized:

I do not desire to be understood as justifying the creation of a government monopoly in a case, in which the individual cannot in his individual capacity successfully conduct the business on so large a scale as it is now being managed under a charter of incorporation. If the business can be successfully conducted by a private individual on a smaller scale, and with a reasonable protection to parties having dealing with him . . . that business cannot be converted into a government monopoly, without infringing the constitutional right of the individual to pursue any lawful calling he may select.<sup>203</sup>

Opposition to incorporation is Tiedeman's response to monopolies which arise from forces which are difficult to identify with government intervention.<sup>204</sup> His answer is that these monopolies, too, are a consequence of government grant — even if not by virtue of eminent domain or some other concededly positive act, the mere act of incorporation is tantamount to a government grant creating a monopoly:

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198. By the 1840s and 1850s, general incorporation acts were on the rise as part of a response to government subsidies for economic development. See *Liggett Co. v. Lee*, 288 U.S. 517, 549 (Brandeis, J., dissenting) for the list. General incorporation laws were precisely a Jacksonian response to the complaint that legislative chartering had led to unequal distribution of government benefits. See, e.g., NELSON, *supra* note 64, at 14; Horwitz, *supra* note 25, at 684. It was the ease of incorporation which Tiedeman opposed, not the aim.

199. 1 SFC, *supra* note 8, at 609-10.

200. *Id.* at 609-11.

201. *Id.* at 392.

202. *Id.* at 610.

203. *Id.*

204. According to CHANDLER, *supra* note 58, at 376, the forces responsible for economic concentration in the late nineteenth century were "fundamental changes in processes of production and distribution made possible by the availability of new sources of energy and by the increasing application of scientific knowledge to industrial technology. . . . [The process was] little affected by public policy." See also, R. ROBERTSON, *HISTORY OF THE AMERICAN ECONOMY* 346-47 (3d ed. 1973), arguing that technological advances led businesses to overproduce, hence necessitating combination in order to reduce output. Hovenkamp, *supra* note 85, at 1273 *passim*. Pursuant to this view, the majority of monopolies are, in Tiedeman's language, virtual monopolies, rather than creations of the state. Recognition was probably what led Tiedeman to argue that incorporation could be viewed as the act of privilege by which monopolies were created. Since no large-scale business could, by the turn of the century, be operated without incorporation, all large-scale business could by this definition be brought within the category of regulable, and hence, takable industries.

I insist that the grant of a charter of incorporation of a bank or of an insurance company is as much a grant of a special privilege or franchise, in violation of the constitutional guaranty of equal privileges and immunities, as is the grant of a charter to a railroad or street railway company. Assuming it to be true that banking and insurance, or either of them, cannot be successfully conducted by natural persons without the aid of incorporation, the only method of providing for such businesses, which is consonant with democratic principles of equality, is by their conversion into government monopolies.<sup>205</sup>

The aggregation of capital necessary for these enterprises would be impossible *sans* the statutory privilege of general incorporation, hence, one can consider them, as much as any grant of the right to build a bridge, the product of government sanction. Here, Tiedeman sounds once again like a Jacksonian whose response to concentrations of capital is to insist that they owe their existence to government privilege which may be repudiated.<sup>206</sup>

By 1900, Tiedeman's attitude toward statutory regulation of economic combinations was profoundly ambivalent and even contradictory. On the one hand, anti-competitive practices should be allowed in order to preserve competition. On the other, competition that leads to monopolization should be banned. Nonetheless, the common thread is that a competitive economy must be preserved even if it means, in effect, government action to ensure it. A competitive economy is a higher aim than an unregulated, or even an efficient, economy. But, of course, by the end of the nineteenth century, it was far too late to realistically conceive of abolishing the corporate form. Tiedeman's proposal must have seemed no more than that of an academic Quixote.

#### B. *Competition Between Capital and Labor*

The Progressive historians focussed only on Tiedeman's early statements of opposition to organized labor and classed him with an undifferentiated group of conservatives hostile to the rising force of labor in an expanding industrialized economy. Although his views of organized labor became more positive in his later work, as early as 1886, he had recognized the claims of labor as a legitimate response to the growing concentration of wealth:

[W]e see, more and more clearly each day, that the tendency of the present process of civilization is to concentrate social power into the hands of a few, who, unless restrained in some way, are able to dictate terms of employment to the masses, who must either accept them or remain idle; . . . at best they are barely enabled to provide for the more pressing wants of themselves and families, while their employers are, at least apparently, accumulating wealth to an enormous extent.<sup>207</sup>

However, at that time, he thought there was little that could be done for labor consonant with preserving constitutional government:

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205. 1 SFC, *supra* note 8, at 610.

206. See Siegel, *supra* note 158, at 64.

207. LPP, *supra* note 8, at 569. For a similar view from a laissez-faire economist, see STURTEVANT, *ECONOMICS, OR THE SCIENCE OF WEALTH: A TREATISE ON POLITICAL ECONOMY* 242 (1877) cited in Benedict, *supra* note 28, at 312 ("Surely while these great companies set so stupendous an example of combination to resist competition, no one should be surprised that their employees combine for higher wages . . .").

To place the working classes under special protection against the aggression of capital, beyond the careful and strict enforcement of their rights; to compel the employer to pay the rate of wages, determined by the State to be equitable, is to change the government from a government of freemen to a paternal government, or a despotism, which is the same thing.<sup>208</sup>

Workers would have to accept their inferior position as the inevitable consequence of the unalterable laws of social evolution. The employer has the upper hand "because his natural powers are greater, either intellectually or morally; and the profits which naturally flow from this superiority, are but just rewards of his own endeavors. At any rate, no law can successfully cope with these natural forces."<sup>209</sup> Any attempt by labor to change this situation by legislation would be futile:

Law can never create social forces. On the contrary, law is the resultant of the social forces. If the social forces at work at any given time produce an inequality in the material conditions of classes of society, and give rise to the oppression of one class by another; if the inferior class is not naturally strong enough to resist the oppression, when free from legal restraints, no law can afford it protection.<sup>210</sup>

Thus, while Tiedeman's 1886 position on the relative rights of capital and labor was hardly of a nature to lend aggressive support to the former, it did seem to indicate the impossibility of bettering the conditions of labor through legislation. But his position changed in the second edition, which was written after the turbulent decade of the nineties had made clear that the characteristic feature of the growing American economy was to be great concentrations of capital in a single industrial or financial entity. He had originally believed that all forms of combination in the economy were illegal, whether by labor or capital:

A successful combination of labor will raise the price of labor and hence the cost of the commodity above its normal value in the same manner as the combination of capitalists will increase the cost of the commodity by increasing the return to capital. Free trade is only possible by a prohibition of both classes of combinations which, if successful, are equally dangerous to the public safety and comfort.<sup>211</sup>

208. LPP, *supra* note 8, at 571.

209. *Id.* at 570.

210. *Id.* at 571. This is the substantive jurisprudential totality of Chapter XIV, *The Regulation of the Relation of Master and Servant*, which Paul claims "hemmed in the legislative power at every point." PAUL, *supra* note 23, at 45.

Even in the context of this class competition, Tiedeman carefully distinguished between the ordinary business and that which is the product of a grant. Thus, the only exception to the bitter consequences of natural inequality exists where there is a public interest in a business, which has been expressed in the granting of a franchise or privilege to operate. Then state intervention *is* justified to resolve labor disputes because the legal equality of both parties has been distorted by the government's grant to the employer. In order to keep railroads and telegraph lines operating even during a labor dispute:

it is a legitimate exercise of the police power of the State to compel both parties to submit their claims to a competent tribunal, thus adjusting their differences, and preventing an injury to the public. There may be a practical inability to enforce even such a law, because of the powerful political influence of the capitalists; but it is nevertheless justifiable, on constitutional grounds, because the legal equality is disturbed in these cases by the grant to the corporation of a franchise, a privilege not obtainable by the workman.

LPP, *supra* note 8, at 573.

211. *Id.* at 247.

But he later came to think that liberty of contract meant that unions themselves were not criminal:

so far as they undertake to do no more than by combination to better their own condition, by dictating the terms of the contract of hiring for themselves. And in laying this down as the law of the land, the courts have merely secured to the workman the same liberty of contract, which the capitalist has enjoyed at the common law.<sup>212</sup>

By 1900, Tiedeman apparently had come to believe that labor's struggle was another example of that competition in the economy which he was determined to preserve. Thus, it *could* be pursued successfully by means of organization, organization which was not inherently illegal and for which labor could seek legislative support.

He recognized that labor's pursuit of legislative assistance to win shorter hours and better working conditions was a direct consequence of the way in which the doctrine of liberty of contract emphasized the relative weakness of the single laborer in relation to the single employer:

If the legal equality, which is declared to exist between employer and employee, was a reality, instead of a legal fiction, the laborer would not seek legislative interference in his contractual relations with the employer . . . . [T]here can be no substantial equality between the man, who has not wherewith to provide himself with food and shelter for the current day, and one, whether you call him capitalist or employer, who is able to put the former into a position to earn his food and shelter. The employer occupies a vantage ground which enables him, in a majority of cases, to practically dictate the terms of employment. Liberty of contract, unrestricted, is to the laborer not always an unmixed blessing.<sup>213</sup>

Though he has been vouchsafed this insight, the courts have not: "[T]he constitutional guaranty of liberty of contract is intended to operate equally and impartially upon both employer and employee; and we find, therefore, that most of the attempts at legislative interference are pronounced unreasonable, and hence unconstitutional."<sup>214</sup>

Tiedeman also came to approve of state laws which exempted labor unions from antitrust statutes. Some might consider such a law "an unconstitutional discrimination against the capitalist and an unauthorized favoring of the laboring classes in the industrial warfare,"<sup>215</sup> but the legislation can withstand that attack:

[T]his legislation is an undoubted . . . determination of the State to diminish the natural inequalities of capital and labor . . . . When one considers this matter, apart from the fiction of equality of all men before the law, and from the technical rules of constitutional law which rest upon that fiction, it does not seem unreasonable.<sup>216</sup>

Of course, unless such a statutory exception is made, "the irresistible conclusion is that all labor combinations, in restraint of trade and competition, are prohibited by these anti-trust statutes, as much so as are the combinations of

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212. 1 SFC, *supra* note 8, at 419.

213. *Id.* at 315.

214. *Id.* at 316.

215. *Id.* at 423.

216. *Id.* at 423-24.



capital.”<sup>217</sup> But Tiedeman was not, in fact, evenhanded in his view; he believed anti-competitive combinations of capital, like trusts, were appropriately barred by statute or common law, even though pro-competitive combinations of labor or smallholders might not be.

### C. *Searching for a Coherent View of Competition*

The thinking underlying this duality becomes clearer in Tiedeman's discussion of combinations of capital and of labor and the statutes that aimed to control them, in the context of the well-known English case, *Mogul Steamship Co. v. McGregor*.<sup>218</sup> As we have seen, much anti trust legislation he regarded as ill-considered and poorly constructed.<sup>219</sup> That language was probably a response to Holmes' discussion of the same issue in the context of the same case. In an 1894 article, Holmes had argued that there are “very serious legislative considerations which have to be weighed” in deciding the legality of combinations, and those should not be left to “unconscious prejudice or half conscious inclination.”<sup>220</sup> In language which must have grated on Tiedeman, he said, “The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.”<sup>221</sup>

Still more provoking, Holmes rejected *sic utere*, Tiedeman's “fundamental rule” of human law,<sup>222</sup> as a useful guide to such decisions:

Questions of policy are legislative questions, and judges are shy of reasoning from such grounds . . . decisions for or against the privilege [to damage another], which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning.<sup>223</sup>

Holmes believed that a regime of free competition could not coherently deny labor the right to compete with capital on the grounds that workers seek to weaken or destroy their employer's business; every competitor does that and yet the injuries due to competition are privileged. Where the issue is the legality of combinations designed to injure competitors, whether class or business rivals, the “ground of decision really comes down to a proposition of policy . . . [J]udges with different economic sympathies might . . . decide such a case differently when brought face to face with the issue.”<sup>224</sup>

But Tiedeman's snort at “ill-considered” legislation was not accompanied by any disagreement with Holmes as to the proper outcome of the question of whether capitalist and labor combinations were equally privileged to do injury. He advised “a rigid adherence” to what he called:

217. *Id.* at 420.

218. 21 Q.B.D. 544 (1888), *aff'd*, 1892 App. Cas. 25.

219. *See supra* text accompanying note 191.

220. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 9 (1894).

221. *Id.*

222. *See supra* text accompanying note 53.

223. Holmes, *supra* note 220, at 3.

224. *Id.* at 8.

the individualistic principle of the liberty of all, in the industrial warfare, — which is now being waged, year by year with greater intensity, — to do anything which does not constitute a trespass upon the rights of others, as long as the motive of the act, which may be injurious to others, is the promotion of the material welfare of the actors.<sup>225</sup>

In fact, Tiedeman believed that inequality required laborers to combine and did not consider such combination to coerce employers ipso facto illegal. If employees strike:

in order to obtain an increase in wages for themselves or to better the terms and conditions of their employment, which they professedly have a right to do, the . . . strike is not converted into an unlawful conspiracy, because in their effort to win their battle the workmen . . . endeavor, to cripple the employer's business, as long as they do not do acts and employ means, which are in themselves unlawful. The intent to cripple the employer's business is necessary to a successful strike.<sup>226</sup>

Tiedeman, like Holmes,<sup>227</sup> discussed *Mogul* from this perspective. *Mogul* held that the commercially competitive aim of destroying the business of rivals by combination was not actionable under the common law so long as only lawful means were used. It impliedly raised the question, Tiedeman notes,<sup>228</sup> of why labor could not combine against employers in its struggle with capital. "Both kinds of combinations are engaged in an industrial war, and both are actuated by the same motive, viz.: the procurement of better prices for the commodities, which they have to sell . . ."<sup>229</sup> Ultimately, then, the necessity to beat back the great concentrations of wealth justified both the organization of workers and the nationalization of monopolies.

## IX. CONCLUSION

Tiedeman, in his later work, was considering some of the key legal puzzles of an expanding market economy: Does the law disallow competitive acts otherwise lawful simply because they create a monopoly by successfully eliminating competitors? If so, what level of government intervention is required to maintain competition? If not, is there to be no legal restraint on economic concentration? Does the public interest protect a competitive marketplace or an efficient one? Is there a legal right to carry on small-scale trade, or is the success of combination simply another aspect of the competitive evolutionary struggle for survival? And is it equally acceptable for labor to combine to gain an advantage over capital, in that competition?<sup>230</sup>

225. 1 SFC, *supra* note 8, at 444.

226. *Id.* at 429.

227. Holmes, *supra* note 220, at 7 *passim*.

228. 1 SFC, *supra* note 8, at 465.

229. *Id.* at 442.

230. For further recent discussion of these questions as they were considered in the nineties, see M. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW AND POLITICS* (1988); Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017 (1988); May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 *OHIO ST. L.J.* 257 (1989); Peritz, *The 'Rule of Reason' in Antitrust Law: Property Logic in Restraint of Competition*, 40 *HASTINGS L.J.* 285 (1989).

The concept of competition was under tremendous pressure in the Gilded Age — concentrations of both capital and labor appeared to be the natural product of the developing economy. The outcome of competition was anti-competitive. It was surely more efficient, but for smallholders, efficiency could not justify the contraction of competition. They saw themselves as the heirs of the Framers, those for whom the Constitution was designed. Whatever the tendencies of the economy, whatever the sentiment of the public, the Constitution must offer protection to them. Tiedeman thought that, if one accepted the principle that the preservation of a small-scale economy was central to the success of the republic, and thus could be read as embedded in the Constitution, the answers to the nagging questions of competition and concentration could be answered judicially, rather than legislatively, and through the use of simple and scientific rules.

In this manner, he attempted to escape the quandary Holmes had pointed out in trying to answer the same questions: The motto that people are free to do as they will so long as they do no injury is not a useful guide in a regime which expects, indeed thrives on, the injuries dealt in competition. The injury inflicted in competition is a consequence of the privilege to do such injury, which is granted by the law. Tiedeman's answer was that the privilege to injure could be rescinded. "No one has a natural right to do that which injures another. If the law permits him to do this it is a privilege, which may be revoked at any time by the proper authority."<sup>231</sup> When economic concentration injures labor, labor may organize; when it injures smallholders, its privilege should be revoked because the preservation of a smallholders' economy is "the concern of the government."<sup>232</sup>

The rationale was that some kinds of property are not really private, but public: their very existence is a consequence of public grants to private individuals. He combined the Spencerian denigration of the state as the anti-evolutionary protector of the weak with the Jacksonian notion of the opposition of property and privilege. He reached the grand conclusion that great economic concentrations owed their existence not to success in competition but to the anticompetitive intervention of the state. It was precisely the evolutionarily detrimental and artificial intervention of the state which was tilting the natural balance against smallholders. Only the restitutional intervention of the state to recapture those privileges it had unequally disbursed could restore the competitive balance of the economy.

The Spencerian doctrine remained useful to Tiedeman even when the economy became dominated by great concentrations of capital at the foot of which small businesses scrambled for a toehold. Then, Tiedeman was willing to call for government intervention to protect erstwhile competitive failures on the ground that concentration in the economy was the consequence of government intervention, rather than the inevitable progress of the economy powered by the competitive struggle for survival. Tiedeman's opposition to regulation as govern-

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231. LPP, *supra* note 8, at 425.

232. *Government Ownership*, *supra* note 17, at 482.

ment intervention in the eighties became the late nineties' notion that government intervention was responsible for economic concentration.

By the time his revision of the police power treatise was published in 1900, Tiedeman was arguing that the state, for whose power he had sought limits as a bar to the redistributive force of democratic majorities, should exercise that power to take over banks, railroads, insurance companies, public utilities, and communications. Only thus could private property be preserved. The doctrine of the police power, once broad and comprehensive, then recast as a limitation on democratic majorities, Tiedeman now urged as a force powerful enough to derail the juggernaut of economic concentration. By the end of his life, he was an antimajoritarian statist, seeking in the power of the state the means to preserve a dying form: a national economy of smallholders.

The intellectual justification for Tiedeman's statism was a peculiar combination of pre-industrial notions of property and pseudo-scientific versions of Darwinian evolution. Its real interest is not so much its theoretical underpinnings as what it reveals about the plight of a group which, having had the power to make the law, has now lost it. It can no longer determine what the law is to be, but must follow the lead of others. It understands that law is contingent upon public opinion, for it has seen that opinion, and then the law, change.

Tiedeman himself is fighting a rearguard battle for the ideological structures — the social nature of property, the distinction between property and privilege, government control of monopolies, the importance of competition, and the freedom of small business from regulation — which served smallholders in the period of their ascendancy. He is trying to adapt these structures to the situation in which there are new powers in the land. In fact, he fails. Far from being the herald of new doctrines of laissez-faire, as the Progressive historians had it, Tiedeman is the last bugler of a lost regiment.